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In the
Supreme Court
of the
United States

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RAY C. SIMMONS

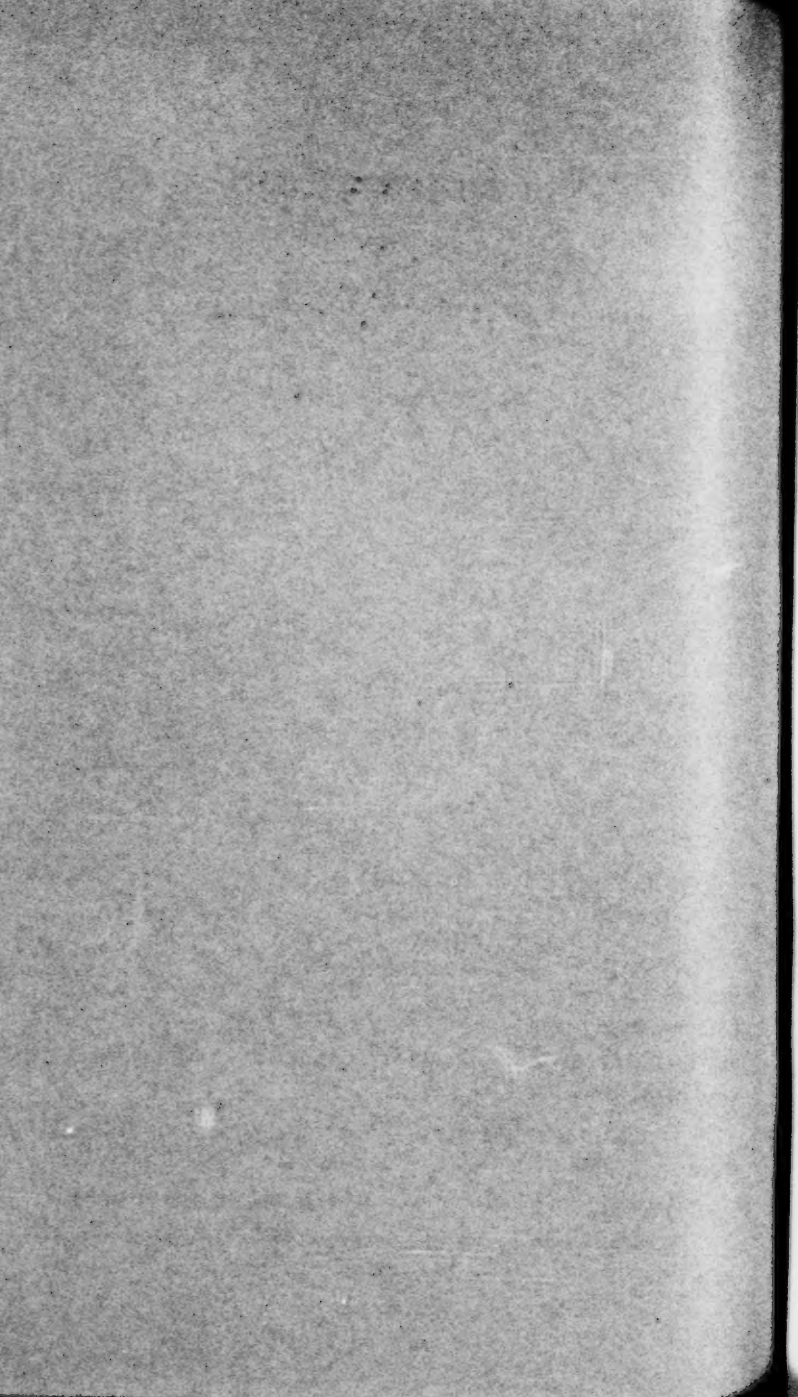
vs.

EDWARD P. SWAN

Petition for Writ of Certiorari

to the

United States Court of Appeals for the First Circuit



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**The Supreme Court
of the
United States**

October Term, 1925.

Ray C. Simmons, Petitioner,

vs.

Edward P. Swan, Respondent.

*To the Honorable the Chief Justice and Associate Justices of
the Supreme Court of the United States.*

Your petitioner, Ray C. Simmons, respectfully represents that he brought his action against the Respondent to the District Court of the United States for the District of Massachusetts, on account of diversity of citizenship, for recovery of damages for breach of contract.

Said action was heard before a jury and a verdict for the defendant was rendered by direction of the Court.

Upon the pleadings and a Bill of Exceptions duly settled, the case was taken by Writ of Error to the Circuit Court of Appeals for the First Circuit which court affirmed the decision of the District Court by a divided bench, March 3, 1926.

The issues before the Circuit Court of Appeals were

Was the trial court justified in directing a verdict or was there evidence from which the jury might determine

First, whether the plaintiff had performed all things required by him to be performed and therefore was entitled to a verdict.

Second, whether, if plaintiff had failed to perform, was performance prevented or obstructed by defendant.

Third, whether the conduct and actions of the defendant were such as to estop him from demanding from the plaintiff, in connection with documentary performance, pecuniary performance in legal tender dollars in lieu of the dollars ordinarily employed in commercial transactions.

The Petitioner insists that the decision of the Circuit Court of Appeals should be reversed because:

(1) in the language of Judge Anderson, dissenting, "The result reached is grossly unjust to the plaintiff. More important, the decision commits this Court to a rule of law entirely inconsistent with modern business practices, and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligations of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right-enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community," and because

(2) the decision of the Circuit Court of Appeals deprives the plaintiff of his constitutional right to have determined by a jury the question of fact as to whether or not the conduct and action of the defendant did, in fact, constitute an obstruction or prevention of tender of performance of the contract by the plaintiff, and because

(3) the admitted error by the trial judge in construing the state law of Massachusetts that a wife must join with her husband in the execution of a purchase price mortgage deed so influenced and warped his judgment as applied

to the other questions in issue as to create a conclusion relating to the other issues which was unjust and unfair to the plaintiff, and because

(4) there was evidence to go to the jury to establish breach of contract and deceit on the part of the defendant when said evidence induced the trial judge to make the following observations during the course of the trial.

"It is perfectly obvious that he (the defendant) was trying to get out from under his contract," and

"Your man (the defendant) was pretty careful to keep away until the banks were closed."

And again after a statement made by counsel that the certificate of deposit was as good as cash, the Court said

"It happened to be. There were no grounds to think it wasn't. I agree that his (the defendant's) attitude was entirely unreasonable and taken by a man who wanted to escape his honest obligations", and because

5) whether or not the conduct and action of the defendant did estop him from demanding from the plaintiff \$2500 in legal tender money in lieu of a certificate of deposit issued by a national bank of admitted solvency which was tendered to him.

Your Petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court

of Appeals for the first circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled Ray C. Simmons, Plaintiff, Plaintiff in Error, vs. Edward P. Swan, Defendant, Defendant in Error, No. 1869, to the end that the said case may be reviewed and determined by this court as provided in Judicial Code, Sec. 240, or that your Petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your Petitioner will ever pray.

RAY C. SIMMONS, *Petitioner.*

By PERCY S. BRYANT,
Counsel.

STATE OF CONNECTICUT,)
COUNTY OF HARTFORD.) ss.

Percy S. Bryant, being duly sworn, says that he is one of the counsel for Ray C. Simmons, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

PERCY S. BRYANT.

Subscribed and sworn to before me by Percy S. Bryant this, the 11th day of May, A. D. 1926. My commission expires February 1st, 1929.

MORRIS S. FALK,
Notary Public, Hartford County, Connecticut.

SUPPORTING BRIEF

1. The decision in this case is in conflict with the decision of the case of *Servil vs. Jamieson* decided in the Ninth Circuit. This conclusion is supported by the dissenting opinion of Mr. Justice Anderson who says, "The case for the plaintiff is at least as strong as in *Servil vs. Jamieson*, 255 Fed. 852, where the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court like the one made by the Court below in this case, holding the case was for the jury.

2. The writ of certiorari should issue in this case because the decision has decided an important question of general law in a way probably untenable as applied to modern business practices. In the words of Mr. Justice Anderson dissenting, "I find no case which on fair analysis of the facts go so far in support of an inappropriate and unnecessarily technical rule as does the decision of the majority in this case. This decision extends a rule that should be narrowed. What the business community understands the word "payment" to mean should so far as possible be its meaning in law. At any rate, attempts to escape performance of contract obligations by invoking technicalities of this sort call for a liberal interpretation of the doctrine of estoppel and the submission of all questions of fact to the conscience and intelligence of the jury."

3. The writ of certiorari should issue because, in the words of the dissenting opinion, "The decision commits this court to a rule of law entirely inconsistent with modern business practices and which will inevitably operate to promote trickery and unfair dealing. It tends to destroy the obligation of contracts, the enforcement of which is one of the main duties of courts of justice. Law, as a right enforcer, ought not to be allowed to drag unnecessarily behind the established, honest practices of the business community." After careful consideration of the

record, Mr. Justice Anderson reached the conclusion that "in this case the result reached is grossly unjust to the plaintiff."

4. The writ of certiorari should issue because the Circuit Court of Appeals erred in construing the provision of the contract which required that \$2500, in view of the preceding relations, customs and precedents between the parties, meant, so far as the transaction in question was concerned, legal tender money when examination of the record will disclose that the defendant not only had accepted the plaintiff's check for a substantial amount theretofore but had by letter requested the payment by check of \$15,000, a sum six times as great as the amount for which the defendant afterwards demanded legal tender in payment thereof. Not only in accordance with the practice that had been previously established between the parties but in exact accordance with the established practices in the overwhelming majority of commercial transactions involving any substantial amount, the plaintiff in good faith tendered to the defendant not alone his own check but actually made physical tender of a certificate of deposit on a national bank of conceded soundness.

5. The writ of certiorari should issue because the defendant, by his actions and his letter asking for a check from the plaintiff for a much greater amount, estopped himself from demanding legal tender in the amount of \$2500. In the words of the dissenting opinion, "The gist is that the defendant left the plaintiff without the slightest reason to expect that payment by the usual method in all substantial business transactions would not be accepted. Cf. *Shutte v. Thompson*, 15 Wall. 151, 159, 160; *Wight v. Davidson*, 181 U. S. 371, 377; *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 560; *Baker v. Humphrey*, 101 U. S. 495.

6. The writ of certiorari should issue because there was substantial evidence in this case for the jury of waiver

or estoppel. In the words of the dissenting opinion, "In my opinion there was abundant evidence in this case for the jury of such waiver or estoppel. The defendant's motive to escape from his contract was obvious; for, because of a frost, the stock of pickles he was selling were then worth substantially more than the contract price. He did not reach the place agreed upon for completing the trade until after the close of ordinary business hours. This was a most significant fact. It was at least six or seven o'clock in the evening before the papers were ready to be passed. Then, for the first time, the defendant refused to accept the plaintiff's certified check, — demanded cash, and, failing to get it, left the office."

7. The writ of certiorari should issue because a court of justice is placed in a position where it is made to appear to lend itself to the promotion of trickery and fraud. In the words of Mr. Justice Anderson dissenting, "There were other facts and circumstances tending to show that the defendant sought, and found (as is now in effect held), a chance to trick the plaintiff out of rights arising under any fair and honest code of business ethics."

Such a condition of affairs certainly calls for an exercise of this court's power of supervision.

PERCY S. BRYANT,
WILLIAM J. MALONE,
MORRIS S. FALK,

Counsel.